Country Club of Little Rock *and* Katherine E. Moss. Case 26-CA-8586

March 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 3, 1981, Administrative Law Judge Richard A. Scully issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Country Club of Little Rock, Little Rock, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.[2]

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge: Based on a charge filed on August 12, 1980, by Charging Party Katherine E. Moss, a complaint was issued by the Regional Director for Region 26 of the National Labor Relations Board on September 4, 1980, alleging that Country Club of Little Rock (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by discharging Katherine E. Moss because she engaged in activities protected by Section 7 of the Act, specifically, filing a sex discrimination charge against the Respondent with the Equal Employment Opportunity Commission (EEOC) and notifying local newspapers about the filing of the charge. The Respondent filed a timely answer denying that it had committed any violation of the Act. A hearing was held in Little Rock, Arkansas, on March 4, 1981.

All parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present argument. Briefs submitted on behalf of the General Counsel and the Respondent have been carefully considered. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent was a nonprofit Arkansas corporation with its principal place of business in Little Rock, Arkansas. During the 12 months preceding the filing of the complaint, it had gross revenues in excess of $500,000 and had purchased goods valued in excess of $5,000 directly from points outside the State of Arkansas. The Respondent operates a private country club providing recreational facilities such as golf, tennis, and swimming as well as dining and bar facilities exclusively to club members and their guests. The Respondent has about 85 to 90 employees on a year-round basis and during the summer employs as many as 115 workers.

In its answer, the Respondent admits the foregoing facts concerning its gross revenues and out-of-state purchases but denies that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is subject to the Act. Counsel for the Respondent did not pursue these points in his brief. I find that the Respondent does substantial business affecting commerce and is, therefore, an employer engaged in commerce within the meaning of the Act. See *Walnut Hills Country Club*, 145 NLRB 81 (1963).

The Respondent is not now and never has been a party to a collective-bargaining agreement with a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Katherine Moss began working for the Respondent as a part-time waitress in the country club's main dining room in March 1980.[1] She worked evening shifts, from 5:30 to 10 p.m., 3 or 4 days a week. At the time, she was a full-time college student. After school was over in June, her request for additional hours was granted and she worked more evening shifts and some lunch shifts.

After receiving her first paycheck as a full-time employee, Moss realized that she was only making $4 per hour instead of the $5 that she understood she was to receive when she was first employed. She contacted William H. Courtenay, the general manager of the country club who is directly in charge of food and bar operations, to inquire about her rate of pay. Courtenay told her it was the club's policy to pay part-time people $5 per hour in order to get them to come in for 2 or 3

[1] All dates hereinafter referred to are in 1980.

hours at a time, while full-time help was paid $4 per hour. She discussed this with other employees and at least one, Larry Moss,[2] confirmed that this was in fact the policy of the club.

Moss subsequently enrolled in summer school and was permitted by Courtenay to switch back to part-time work as of July 17. Upon receiving her first paycheck after returning to part-time status, Moss found she was still being paid at the rate of $4 per hour. She spoke to Larry Moss about this around July 24 or 25 and was told that he would change her rate of pay, retroactive to July 17. When she received her next paycheck, she was still being paid at the $4-per-hour rate. On August 3, after her shift, Katherine Moss went to see Courtenay and asked him why she was only being paid $4. Courtenay answered that the club could not afford to pay her more. She responded that she knew of other people who were making $5 per hour. Courtenay asked her who they were and she mentioned one waitress by name. Moss then asked Courtenay if he fixed pay rates abitrarily and he responded that he did. At that point, Courtenay indicated he did not want to discuss the matter further and that she could take or leave the $4 per hour. When Moss asked if the rate of pay depended upon how Courtenay felt about the employee personally, he told her to leave or he would ask her to go for good. Moss then left.

Moss worked the evening shift on August 4. On August 5, a day she had off, she went to the EEOC office and filed a charge alleging sex discrimination by the Respondent. The charge alleged that Moss felt she was being discriminated against on account of her sex because she knew of a recently hired part-time male waiter who was being paid $5 per hour while she was only paid $4 and that the Respondent had lowered her pay from $5 to $4 when she went from part to full-time employment but failed to raise it to $5 when she returned to part-time status.

After filing the charge, Moss called a local newspaper, the Arkansas Democrat, and talked to a reporter about it. The reporter called Courtenay, informed him of the filing of the charge, and asked for his comments. Courtenay responded that he did not knowingly discriminate against anyone and hung up when the reporter sought a further statement. A story concerning Moss' charge appeared in the morning edition of the Democrat on August 6. Upon his arrival at the club on August 6, Courtenay learned that a television news camera crew and reporter had been there earlier seeking to interview him, but had left before he arrived. At that point, Courtenay decided to fire Moss, had her timecard pulled, and had the bookkeeper make out her final check. When Moss arrived at work that evening she found her timecard missing. She obtained a new card, clocked in, and went to the dining room to begin work. A few minutes later, Courtenay came into the dining room and told Moss that he had pulled her timecard and that she was not working there anymore. Nothing more was said and Moss left.[3]

Moss testified that on August 7 she returned to the EEOC office to file "a retaliation complaint" as she had previously been advised to do in the event she was discharged. While there, at the request of an EEOC staff member, Moss called Courtenay to confirm that she had been discharged and not merely laid off. Courtenay told Moss that she had been fired and, when Moss asked why, Courtenay responded, "If you don't know that, little girl, you're in sad shape." Moss repeated the question and Courtenay told her she had been fired because she "filed the first complaint and went to the papers about it." Moss thereupon filed a second charge alleging that she was fired because she had filed a charge against the Respondent with the EEOC.

Courtenay denied that he told Moss that she was fired because she had filed a charge with the EEOC. He testified that she was fired "because of the fact that she had gone to the news media" and that in the telephone conversation on August 7 the "gist" of what he told Moss was that she was fired because "she had caused all this commotion by contacting the news media."

I credit Moss' version of their telephone conversation rather than that of Courtenay, who appeared unsure of himself and apparently had little or no independent recollection of the events surrounding Moss' discharge as he constantly referred to notes throughout his testimony. His claim that he was not even aware of the type of charge Moss had filed and that he thought it related to a state unemployment claim was not convincing. He testified that a reporter had told him that the charge had been filed with the EEOC in a telephone conversation on August 5. His statement to the reporter that he did not "knowingly discriminate against anyone" indicated that he was aware of the nature of Moss' charge. He also testified that he had read the article in the Arkansas Democrat, which stated that Moss had filed "a sex discrimination complaint against the club" with the EEOC, before he fired her. Moss, on the other hand, appeared to have a clear recollection of the telephone conversation with Courtenay and her testimony was consistent with the allegations in the second charge which she filed with

[2] Larry Moss, who is no relation to the Charging Party, was employed by the Respondent as a chef. According to Courtenay, during the time Courtenay was on vacation during July, Larry Moss was temporarily given the assignment and title of assistant food and beverage manager. Upon Courtenay's return from vacation, Larry Moss returned to his position as chef.

[3] The foregoing findings are based on the credited testimony of Moss and Courtenay. The only significant difference in their testimony concerns the rate of pay Moss was to receive when she was hired, which Moss said was $5 per hour. Courtenay denied telling Moss she was to be paid $5. It was stipulated that Moss was never paid more than $4 per hour at any time during her employment with the Respondent. I credit Courtenay and not Moss on this point. The employee data form the Respondent maintained indicated that Moss was to be paid at the rate of $4 per hour when she was hired. I find it unlikely that Courtenay would have promised Moss $5 and then paid her only $4. I also find it likely that, if Moss expected to receive $5 per hour when hired in March, she would have realized that she was being paid only $4 per hour before June. On the other hand, I believe that, once Moss learned from Courtenay and Larry Moss in June that the club's policy was to pay part-time help $5 per hour, she fully expected to receive that amount when she commenced part-time employment in July, an expectation that was encouraged by Larry Moss when he promised her an increase to $5 per hour, retroactive to July 17. It was the Respondent's failure to pay her at the rate of $5 per hour while other employees, including a recently hired male employee, were paid at that rate which prompted Moss to file her charge with the EEOC.

the EEOC immediately after that conversation. I find that Moss was discharged because she filed a sex discrimination charge against the Respondent with the EEOC and because she discussed the charge with a newspaper reporter.[4]

The Respondent is a nonprofit, private membership club which is certified as tax exempt by the Internal Revenue Service under 26 U.S.C. Section 501(c) of the Internal Revenue Code of 1954.

Prior to filing the sex discrmination charge with the EEOC, Moss did not discuss with any other employee the fact that she felt she was being paid less than other employees because she was female or that she was going to file the charge. She testified that when she spoke to Courtenay on August 3 she was acting on her own behalf and not on behalf of or as a representative of any other employee.

The General Counsel contends that Moss was engaged in concerted activities protected by Section 7 of the Act when she filed the sex discrimination charge with the EEOC and brought it to the attention of the news media and that by discharging her because of such activities the Respondent violated Section 8(a)(1) of the Act. The Respondent contends that Moss' actions were not concerted activities under the Act and, even if they were, they were not protected.

B. *Analysis*

The Respondent points to the fact that Moss acted alone, solely for her own benefit in filing the sex discrimination charge with the EEOC. She did not act as the representative of any other employees, nor was she authorized by them to do so. She did not discuss her allegations of discrimination with any other employees nor did she inform anyone of her intention to file a charge with the EEOC. It therefore argues that Moss' activities were not concerted activities entitled to protection under Section 7.

The fact that an individual employee has acted alone does not necessarily mean that the employee was not engaged in concerted activities. The Board has consistently held that the actions of a single employee who seeks to enforce or implement the provisions of an existing collective-bargaining agreement constitute concerted activities protected by Section 7 because such actions are an extension of the concerted activity giving rise to the agreement.[5] Even in the absence of a collective-bargaining agreement, the Board has deemed an individual employee's actions to constitute protected concerted activity where the employee: filed a safety complaint with a governmental agency;[6] filed a claim for unemployment compensation benefits;[7] inquired at the employer's bank as to whether there were sufficient funds on deposit to meet the upcoming payroll;[8] expressed an intention to file a claim for workmen's compensation benefits;[9] filed a claim with a governmental agency for back overtime wages;[10] wrote a letter complaining about racism, sexism, favoritism, and denial of a wage increase;[11] refused a work assignment unless paid the same as male employees doing the same job;[12] and/or filed a sex discrimination complaint with a governmental agency.[13] In each case, although acting alone, the employee's action arose out of the employment relationship, was a matter of common concern to other employees similarly situated, and involved an aspect of national labor policy. In the absence of any evidence that fellow employees disavow such representation of their mutual interests, the Board "will find an implied consent thereto and deem such activity to be concerted."[14]

In the present case, it is clear that Moss acted alone without consulting with or advising fellow employees that she was going to file the sex discrimination charge and to publicize the fact that she had done so. However, her actions arose out of her employment situation and involved sex discrimination, a matter that the Board has recognized as one of common concern to other employees and one which Congress as well as certain state and local governments have enacted legislation to prevent. These facts notwithstanding, the Respondent contends that, because as a tax-exempt, private membership club it is exempt from the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964,[15] Moss' complaint to the EEOC could not have benefited her or any other employee, and, therefore, is not concerted activity even constructively.

The Board has held that whether the employee's complaint has merit is irrelevant to the issue of whether the employee is engaged in concerted activity.[16] It follows that, even if Moss' filing of a charge with the EEOC was ineffective because it was erroneously filed with anagency without power to act upon it, her refusal to acquiesce in what she perceived as discriminatory treatment in her employment and her attempt to do something about it would be a matter of common concern to other employees and would constitute protected concerted activity under established Board precedent.

Moss' bringing the filing of her charge with the EEOC to the attention of the press and discussing it with a reporter was a reasonable extension of her action in filing the charge and is, likewise, protected by Section 7 of the Act. There is no evidence to support the Respondent's contention that Moss' actions were disloyal or that her "behavior threatened her employer's business inter-

[4] In response to an unemployment compensation claim by Moss, Courtenay filed a form which gave as the reason for her discharge "work unsatisfactory." Courtenay admitted that this was not correct.

[5] E.g., *King Soopers, Inc.*, 222 NLRB 1011 (1976); *Roadway Express, Inc.*, 217 NLRB 278 (1975); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966); *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516 (1962).

[6] *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

[7] *Self Cycle & Marine Distribution Co., Inc.*, 237 NLRB 75 (1978).

[8] *Air Surrey Corporation*, 229 NLRB 1064 (1977).

[9] *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979).

[10] *United Investment Corporation d/b/a Santa's Bakery*, 249 NLRB 1058 (1980).

[11] *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215 (1977).

[12] *Dawson Cabinet Company*, 228 NLRB 290 (1977).

[13] *Hotel and Restaurant Employees and Bartenders Union, Local 28, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO*, 252 NLRB 1124 (1980).

[14] *Alleluia Cushion Co., Inc., supra* at 1000.

[15] See 42 U.S.C. § 2000 e(b)(2).

[16] *ARO, Inc.*, 227 NLRB 243 (1976).

ests, was insolent and insubordinate, and was designed solely to embarrass her employer." On the contrary, it appears that Moss' actions were based on a good-faith belief that she was being paid less than a male coworker for no reason other than the fact that she was a female and were taken only after she had contacted Larry Moss and Courtenay with her problem and failed to receive satisfaction. The allegations of the charge filed with the EEOC and the statements attributed to her in the Arkansas Democrat are straightforward, state the facts as she understood them, and are limited to the subject matter of the dispute with her Employer.

Moss was entitled to make the public aware of the dispute with the Respondent and in no sense did her statements constitute a disparagement or vilification of her employer or its reputation so as to render them unprotected.[17] In this regard, it appears that the Respondent or, at least, its general manager, William H. Courtenay, has an extraordinary sensitivity to publicity.[18] Although she testified that she thought publicity about her charge might eventually be embarrassing to the Respondent, it is clear from her testimony as a whole that this was not a significant factor in her motivation for filing or publicizing the charge.

I find that Katherine Moss was engaged in concerted activity, protected by Section 7 of the Act, when she filed a sex discrimination charge against the Respondent with the EEOC and when she discussed that charge with the news media and that the Respondent violated Section 8(a)(1) of the Act when it discharged her specifically because she engaged in such protected activities.[19]

CONCLUSIONS OF LAW

1. The Respondent, Country Club of Little Rock, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Katherine E. Moss because she engaged in concerted activities protected under the Act, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

3. The unfair labor practice found herein is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[17] See *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229 (1980).

[18] Courtenay testified as follows:

> Q. Now, would you tell us, in your own words, why did [you] fire Miss Moss.
>
> A. The reason she was fired is because of the fact that she had gone to the news media. She tried to harass and embarrass the club, a private club, a country club. We try to keep a low profile. Everybody, it seems, tries to take pot shots at a club, so I have made the effort to keep a low profile, and, of course, this irritated me [to] no end when she went to the press, and my first knowledge of her filing a complaint was from a reporter.

[19] I am aware of the fact, as pointed out by the Respondent, that certain U.S. circuit courts of appeals have refused to find that the actions of a single employee acting alone constitute "concerted activity" within the meaning of the Act, at least, in the absence of a collective-bargaining agreement. However, I am bound by Board precedent which is clear and consistent in holding that actions of the kind involved here constitute protected concerted activity.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I shall recommend that the Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having also found that the Respondent unlawfully discharged Katherine Moss, I shall recommend that the Respondent be ordered to offer her immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed. In addition, the Respondent will be required to make Moss whole for any loss of earnings she may have suffered by reason of her unlawful discharge on August 6, 1980, less any interim earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be paid on the amount owing computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[20] The Respondent will also be required to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Country Club of Little Rock, Little Rock, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they have engaged in concerted activities for the purpose of mutual aid and protection.

(b) In any like or related manner restraining and coercing employees in the exercise of rights protected by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer Katherine Moss immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The General Counsel's request for interest at the rate of 9 percent is denied. See *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its facilities in Little Rock, Arkansas, copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 26, after being signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and we have been ordered to post this notice.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in concerted activities for mutual aid and protection.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Katherine Moss immediate and full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and give her backpay, plus interest, for any losses she suffered as a result of our unlawfully discharging her.

COUNTRY CLUB OF LITTLE ROCK